85-1135 (1)

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

RICHARD P. FLOYD, Esq.

Petitioner,

v

ELIZABETH R. HAIG, et al.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OR SAFEGUARDS, NOT ENTITLED TO A BIVENS REMEDY FOR VIOLATION OF FUNDAMENTAL CONSTITUTIONAL GUARANTEES, UNDER THE FIRST, FOURTH AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION ?

4. MAY THE COURTS ALLOW THE APPLICATION OF EXECUTIVE IMMUNITY FROM SUIT TO THE APPELLEES, WHEN THE ACTIONS COMPLAINED OF DO NOT INVOLVE MATTERS OF "NATIONAL SECURITY", NOR DO THEY FALL WITHIN THE OUTER PERIMETERS OF THEIR DUTIES ?

5. DID THE UNITED STATES DISTRICT COURT AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT, ABUSE THEIR DISCRETION BY ADOPTING CATEGORICALLY, THE DISPUTED ALLEGATIONS OF FACT, OFFERED BY THE APPELLEES, AND THEREFORE THE COLLATERAL CASE LAW RELIED UPON, TO THEREBY DENY THE APPELLANT OF HIS ELECTION OF A TRIAL OF THE FACTS BY A JURY ? MAY THE CONCEPT OF "NATIONAL SECURITY", BE IMPROPERLY INVOKED, IN ORDER TO JUSTIFY DENIAL OF THE RIGHT OF A FORMER FEDERAL EMPLOYEE AND CITIZEN, TO A TRIAL OF THE FACTS, BY JURY ?

PARTIES - DEFENDANTS/APPELLEES

ELIZABETH R.HAIG; LOUIS J.BONNANI;
JOHN R.TROUTNER; JOSEPH P. BURKE;
EDWARD F.BARR; ROBERT L. JAMES; DON C. JACKSON;
ROY R. BANNER; ARTHUR F.MATHISEN;
BENSON K.BUFFHAM; GENERAL LEW ALLEN JR.;
ADMIRAL BOBBY R.INMAN; UNITED STATES.

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1. JUDGE RAMSEY, Letter memorandum dated November 17, 1981, (Paper 30,below).

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2. JUDGE BLACK, Memorandum and Order, dated October 5, 1983, (Paper 43, below).

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3. JUDGES MURNAGHAN, ERVIN AND SNEEDEN. UNPUBLISHED - Affirmation, Per Curiam, dated August 15, 1985.

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4. JUDGE ERVIN, Order denying Motion for Rehearing, dated October 8, 1985.

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JURISDICTION - SUPREME COURT

1. On August 15, 1985, the United States Court of Appeals for the Fourth Circuit, entered a judgement, affirming the Memorandum and Order of Judge Black, of the Federal District Court of Baltimore, dated October 5, 1983.

2. On August 29, 1985, the Appellant filed a Petition for Rehearing.

3. The Petition for Rehearing was denied on October 8, 1985, by an Order of Judge Ervin, which was entered by the clerk "at the direction of Judge Ervin, for a panel consisting of Judge Murnaghan, Judge Ervin and Judge Sneeden".

4. The Statutory provision which confers jurisdiction upon this Court to review the judgement by writ of certiorari, may be found at 28 USCA 1254 (1).

RELEVANT CONSTITUTIONAL PROVISIONS - STATUTES

1. U.S. CONSTITUTION - FIRST AMENDMENT - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to to petition the Govenment for a redress of grievances.

- FOURTH AMENDMENT - The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

- FIFTH AMENDMENT - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 28 USC 1331 - The district courts shall have original jurisdiction of all civil actions wherein the the matter in controversy exceeds the sum or value of $10,000. exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

3. 42 USCS 1985 Conspiracy to interfere with civil rights (1)Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by

force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

4. MARYLAND CONSTITUTION, DECLARATION OF RIGHTS: "ARTICLE 19. - REMEDY FOR INJURY TO PERSON OR PROPERTY. That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay,

according to the Law of the land".

"ARTICLE 20 - TRIAL OF FACTS WHERE THEY ARISE. That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People".

"ARTICLE 24 - DUE PROCESS. That no man ought to be taken or imprisoned or disseised of his freehold, liberties or privileges, or outlawed, or exiled, or, in any mannwer, destroyed, or deprived of his life, liberty or property, but by the judgement of his peers, or by the Law of the land".

5. PL 86-36 (50 USC Sec. 402). As amended by PL 88-290 (footnote) - 86th Congress, H.R. 4599, May 29, 1959. - AN ACT -
To provide certain administrative authorities for the National Security Agency, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States Of America in Congress assembled, That:
....Sec.2. The Secretary of Defense (or his designee for the purpose) is authorized to

establish such position, and appoint thereto, without regard to the civil service laws,[1] such officers and employees in the National Security Agency, as may be necessary to carry out the functions of such agency".

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[1]Underlined portion the effect of PL-88-290, Amendment, approved March 26, 1964, Sec. 306. (a) "The first sentence of section 2 of the Act of May 29, 1959 (50 USC 402 note), is amended by inserting, "without regard to the civil service laws", immediately after "and to appoint thereto".

No.

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PRAYER

TO THE HONORABLE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Richard P. Floyd, Pro Se, respectfully prays that a writ of certiorari issue to review the judgements of The Federal District Court in Baltimore, and the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

1. As Chief of the National Security Agency (NSA) Division for Procurement Policy and Contract Review and Control, Floyd initiated numerous policy initiatives to improve Agency control of its entire procurement process, and shortly after his January 19, 1977, briefing of the entire NSA Directorate on the scope and magnitude of NSA's "sole source" procurement program, Floyd was libeled by his immediate supervisor, the Director of Procurement, Elizabeth R. Haig.

2. On January 28, 1977, the appellee Haig libeled Floyd, and used that libel to justify her request that Floyd be required to submit to a "a medical evaluation", which he initially declined, for want of probable cause. NSA had no regulation governing the use/refusal of psychiatric examinations. Floyd protested the examination to the Director, NSA (Respondent Allen), who simply ignored the objection.

3. On February 14, 1977 Floyd asked for a

grievance hearing, which was not approved by the respondent Jackson until April 28, 1977. Jackson excluded respondents Burke and Bonnani from Floyd's grievance hearing, on the stated grounds that the NSA regulations exluded "fitness for duty examinations" from the grievance process. Floyd objected to their exclusion as not relevant to the regulation cited, and to their further denial of due process. The Hearing was not convened until June 7, 1977, but did conclude essentially in favor of Floyd.

4. Between the period of February through June 1977, the respondents Troutner, Bonanni, Burke, Barr, James, and Jackson, undertook a series of administrative actions, viewed by Floyd as "reprisal", and prepared a number of complaints against Floyd to justify: (a) Burke's demand for psychiatric examination 3/31/77; (b) Notices of removal on 5/25/77, and 7/15/77; and (c) a performance rating warranting discharge 5/11/77. All three actions are alleged by Floyd to have been based on

false testimony, known by (some of) the respondents to be false, or was attributed anonymously, and without benefit of confrontation, or cross-examination by Floyd. The substantive non-truth of all allegations giving rise to the three administrative actions was established by the NSA Hearing Examiner, in his final report to the then Directors (respondents Allen and Inman) on July 1, 1977.

5. Floyd was required to address these multiple, redundant, and false charges, at the same time that he was attempting to prepare, during April and May of 1977, for the requested grievance hearing. The notice of removal and the performance evaluation, presented at the same time as the grievance hearing, were viewed and protested by Floyd, as administrative reprisal by the NSA defendants.

6. On May 27, 1977, in a letter to the Director, NSA, (the respondent Allen), Floyd protested: Burke's abuse of office; the invasion of privacy (i.e. psychiatrist); denial of due

process; harassment; false performance appraisal; and the firing notice. The respondent Banner answered for the Director, effectively approving all pending actions.

7. On July 12, 1977, the newly appointed Director, NSA (respondent Inman) notified Floyd that from his review of the grievance record, and having given "full consideration to the .. findings and recommendations of the Grievance Examiner", he concluded, inter alia, that "Mrs. Haig acted reasonably, without malice, pursuant to NSA regulations, and consistent with her managerial responsibilities"..... "My decision is that your grievance is not sustained".

8. On July 13, 1977, Floyd protested Inman's apparent denial of the NSA Examiner's findings, which contradicted all pending adverse actions.

9. On July 15, 1977, respondent Jackson notified Floyd of his removal, effective July 29, 1977. Floyd's protest on 7/18/77 to Inman was answered and reaffirmed by Inman on 7/21/77.

10. On July 18, 1977, all of Floyd's personal

property was removed from his office, without his approval, and taken to Haig's office.

11. On July 26, 1977, Floyd was locked out of his office, and arrested by Marine guards as he entered the main office building. He notified the Director Inman of his intention to Appeal his firing to the Civil Service Commission (CSC), and that he was also preparing an application for disability retirement.

12. On August 26, 1977, the respondent Jackson notified Floyd that his termination would be extended, (allowing his use of accumulated sick leave, pending CSC assesment of his application for "medical disability" retirement), until such time as he exhausted his sick leave, or was medically retired, "or September 12, 1977, whichever is later".

13. On September 28, 1977, Floyd recieved a pre-dated letter (December 23, 1977), from the appellee Mathisen, advising him (Floyd) of the NSA's recision of his termination.

14. On September 30, 1977, Mathisen

dismissed the question of termination as being "moot", in light of the retirement granted by the CSC. (He did not explain the necessity for rescinding the termination until after the retirement had taken effect, i.e. 9/27/77.), nor did he repond to Floyd's letter of October 4, 1977 reaffirming the false and defamatory. statements used to justify NSA's removal action.

15. In correspondence to various members of Congress, the defendant Buffham assured several members, inter alia, that Floyd's grievance was "being resolved through established channels, regulations and procedures, which are intended to protect the rights of NSA employees".

16. On May 23, 1977 Floyd was found to be "medically, psychologically, and psychiatrically fit for duty", by the NSA Medical Director, Dr. Kirshner, who had also consulted with NSA's own psychiatric contractor, Dr. Eugene Long.

17. On instruction from the CSC medical office, which was considering his application for medical disability retirement, Floyd was

examined by Dr. Walsh on 9/13/77, who found him to be physically fit, and by Dr. Bernard Flaherty, a psychiatrist, on 9/6/77 and 9/13/77, who recommended "expedient disability retirement".

18. On September 14, 1977, the day following his examination by Dr. Flaherty, Floyd was notified by the CSC that his medical disability retirement had been approved.

19. On September 20, 1977, Floyd appealed his termination from the NSA, to the Civil Service Commission, after being assured by Commission counsel, that "medical retirement" and an appeal of the firing notice were not mutually exclusive.

20. On September 28, 1977, the appellee Burke sent a copy of the pre-dated (Sept. 23, 1977) NSA recision of Floyd's termination to the CSC, Mr. Sedmack. He also provided a copy of the retirement notice, effective September 27, 1977.

21. On October 20, 1977, the CSC, Mr. Sedmack rejected Floyd's appeal on the grounds that the termination never took effect, and that because

of the "retirement", the CSC did not have jurisdiction i.e. "not within the purview".

22. On December 16, 1977, Floyd appealed to the CSC Appeals review Board, who on 6/23/78, "decline (d) to entertain the Appeal as beyond the purview of our appellate jurisdiction".

23. On September 27, 1979, Floyd filed suit in the Federal District Court in Baltimore, alleging, inter alia, that the actions of the defendants gave rise to numerous causes of action, for a variety of damages suffered by him. He maintained that the numerous administrative (abusive) actions effected by the NSA, to force his physical removal and "retirement", could not have been effected but for the extraordinary administrative powers granted to the NSA, under PL 86-36, the terms of which are unconstitutional on their face.

24. Floyd sought redress before the Federal District Court in Baltimore under the provisions of: 28 USC Sec. 1331, 1343, & 1346 (b); Civil Rights Act of 1861;

42 USC Sec. 1985 (1) and (3);
U.S. Constitution, 1st, 4th, and 5th Amendments;
Maryland Constitution, Declaration of Rights, Articles 19, 20 and 24; Common Law of Torts.

25. From the date of filing suit in The Federal District Court of Baltimore, on September 27, 1979, until October 5, 1983, the case had been successively assigned, over a period of 32 months to four judges, Judge Black having recieved it last, on May 24, 1982, and retaining it for sixteen months before dismissing the entire case. Floyd's first inquiry of June 1, 1982, to Judge Black was unanswered, and in a second letter, dated November 9, 1982, Floyd questioned the removal of the entire file (Clerk's copy) from the clerk's office of record, reputedly to Judge Black's chambers. This question has never been answered, but Floyd did ask for Judge Kauffman's intercession, to determine if Judge Black found his workload such as to preclude a timely addressal. In his reply, dated November 22, 1982, Judge Black called for

a scheduling conference for December 7, 1982, and therein set a hearing for all outstanding Motions on February 18, 1983. Essentially, the hearing lasted approximately 90 minutes, and was devoted to the Defendant's Motion to Dismiss. On October 5, 1983, the entire case was dismissed.

26. On December 2, 1983, Floyd noted his appeal to the United States Court of Appeals for the Fourth Circuit, and in due course ordered the Transcript of Proceedings. After numerous phone calls to the Clerk (Mr. Schlitz), his appellate assistant (Ms Michaels), and to the Court reporter (Mr. Richardson), including a letter to Richardson on April 20, 1984, Floyd notified the Clerk of the Fourth Circuit, (Mr. Slate) of his good faith efforts to secure the transcript i.e. in comformity with the rules.

27. On May 17, 1984, in a letter to Judge Black, Floyd protested what appeared to be improper advice (by telephone) from a woman who purported to be Judge Black's

secretary, and requested Judge Black's intercession with Mr. Richardson to produce the transcript. This letter was answered on May 25, 1984 by Mr. Richardson, claiming criminal priorities in his transcription work. On June 2, 1984, Floyd ask d the Clerk of the Fourth Circuit in intervene for the production of the transcript, and recieved a tentative reply from Deputy Clerk, Shirley Beasley. Mr. Floyd's second request to Shirley Beasley, dated September 7, 1984 was not answered.

28. On October 20, 1984, Floyd asked Congressman Peter Rodino to intercede in the production of the Transcript of Proceedings, which he later recieved on Friday, November 9, 1984, three working days prior to receiving Congressman Rodino's letter of acknowledgement of Floyd's request, and approximately 21 months after the Motion To Dismiss was heard.

29. The U.S. Court of Appeals for the Fourth Circuit efficiently scheduled and disposed of Petitioner's Appeal, with arguments

heard on May 6, 1985, and judgement issued on August 15, 1985.

30. On August 29, 1985, petitioner filed a Motion for Rehearing, which was denied by Judge Ervin, on behalf of the panel, on October 8, 1985.

RATIONALE FOR GRANTING WRIT

Petitioner believes that three reasons warrant the Court's Writ of Certiorari:

I. UNCONSTITUTIONALITY OF PL 86-36, AS AMENDED.

II. BIVENS REMEDY, DIRECTLY UNDER CONSTITUTION.

III. COURT'S POWER OF SUPERVISION.

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I. UNCONSTITUTIONALITY OF PL 86-36, AS AMENDED.

1. The absolute, administrative authority granted to the Director, NSA, by virtue of Public Law 86-36, as amended by Public Law 88-290[1], is unconstitutional on it's face, and is therefore a nullity[2], notwithstanding

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[1]Extracted on pages (x - xi.), supra.
[2]Marbury v. Madison, 1 C 368 (1803).
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the concept of "National Security" which it was intended to foster, - albeit without definition. As implemented, the Director NSA exercises all all three powers of Government, without redress.

2. Inasmuch as PL 86-36, amended, authorizes the Director, NSA to "establish such position and appoint thereto, without regard to civil service laws"[3], and provides no other standard for administrative regulation, the Director, NSA is effectively given, and he does exercise, the authority to write his own administrative regulations (i.e. to hire and fire), executes them in his capacity as Director, NSA, and when employees are barred from judicial review, as has been true in this case to date, the Director, NSA in effect does exercise all three powers of government, without review or redress. Floyd's notice of termination, dated May 25, 1977, was predicated upon authority of PL 86-36, - which was subsequently avoided by the NSA

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3 - See page (xi.), supra.

contrived "retirement", effected by the NSA Appellees Mathisen and Burke, and recorded in the Joint Appendix to the Fourth Circuit, at pages 102 and 132. The Federal District Court in Baltimore either condoned, or refused to examine this NSA "retirement" deception, (A 24). In it's affirmation, the Fourth Circuit also chose not to question the issue of "voluntary" retirement (A 32). Petitioner's understanding of administrative law suggests that the congress, in it's delegation of legislative power to the Executive Department, is stricly limited, and by prior Supreme Court decision[4], is required to provide reasonably clear standards, including precise definitions of powers and purposes. If "National Security" is not the avowed purpose of NSA's firing a Federal employee, surely the Director, NSA must be held accountable to the regulations and safeguards of Title 5, or some other supervening administrative standard.

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[4]Panama Refing Co. v. Ryan 293 US 388 (1935), and Schechter Poultry Corp. v. US 295 US 495 at 533 (1935).

Appellees collectively relied upon their PL 36-86 firing authority, to justify their removal notices even though based upon false allegations of poor performance and poor working relations with subordinates, to induce Floyd's acceptance of a "medical retirement", after he had been "locked-out" of his offices, and all "secure" spaces at the NSA. For the Courts below to deny Floyd "standing" on the grounds that he had not, in fact, been injured by the application of PL 36-86, (A 24-26, and A36-37), on the pretext of a "voluntary retirement", and yet condone NSA's threat to remove Floyd under a Title 5 USC 7501 (a) justification, i.e. to "promote the efficiency of the service", is to approve to the NSA, any factual allegation or administrative excuse to fire, the NSA may chose, regardless of statutory prescription, or the constitutional rights of citizenship.

II. BIVENS REMEDY, DIRECTLY UNDER CONSTITUTION.

This case offers the Court an opportunity to extend it's rationale for granting a Bivens

remedy, beyond it's most recent definition in the Bush decision[5], and specifically in those cases, as here, where there are no such "comprehensive procedural and substantive provisions" as were accorded to Mr. Bush.[6]

Non-competitive civil servants, who are also exempted from the "comprehensive procedural and substantive provisions" of USC, Title 5 [7], are entitled, under the definitions of current case law[8], to a Bivens remedy, in the absence of "special factors counseling hesitation", which have not been alleged in this case (A15).

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[5]Bush v. Lucas 103 S.Ct. at 2408.

[6]For a comprehensive treatment in the application of Bivens Actions for Federal Employees, see University of Baltimore Law Review, Vol. 14, No. 3, Spring 1985. (and Section IV, page 439).

[7]PL 86-36, page (x.) supra.

[8]Bivens v. Six Unknown Named Agents of FBI, 403 US 388 (1971); Sonntag v. Dooley, 650 F2d. 904; Davis v. Passman, 442 US 228; Carlson v. Green, 446 US 14.

III. COURT'S POWER OF SUPERVISION.

Petitioner asks the Court to exercise it's power of supervision over both the Federal District Court of Baltimore, and the U.S. Court of Appeals for the Fourth Circuit, the former for it's mis-statements of facts, and mis-applications of law, and inordinate delay of process; and the latter for it's categorical affirmation, without benefit of any explanation.

In its restatement of those material facts upon which it based its judgement of affirmation, (A30-37) the U.S. Court of Appeals for the Fourth Circuit, has faithfully restated the District Court's and the Appellee's false allegations of facts, and non-relevant case law to thereby justify dismissal of all claims.

In affirming the Baltimore Court's dismissal, the Fourth Circuit offered the simple explanation that among "Floyd's various claims in the proceedings below,...none of Floyd's contentions on appeal have any merit" (A37).

The Fourth Circuit has offered no further instruction nor explanation, although the factual allegations by both parties are numerous and in conflict. In view of the Court's categorical and unexplained rejection of Floyd's entire presentation, Floyd is compelled to assume that the Court has elected to function as the trier of the facts, as well as the law, and that the Court concurs in the factual account offered by the Department Of Justice on behalf of the National Security Agency, and its former executive defendants.

Inasmuch as Floyd requested a jury trial (Paper # 15, page 25), petitioner respectfully suggests that the courts below have improperly usurped the province of the jury, and by their judgements, have improperly denied Floyd of his right to a jury determination of the facts, as provided for under both Federal and Maryland State law.[9]

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[9]See 28 USC 1861; Maryland Declaration of Rights, Article 20, page (x.) supra.

In presuming the truth and accuracy of the factual allegations made by the Department Of Justice, on behalf of the several (civil servant) defendants in this case, the Court has taken a judgement position which is erroneous, both in fact and in law:

REGARDING FACT

1. NSA GRIEVANCE HEARING

The hearing examiner's findings, regarding Floyd's productivity and working relations with subordinates, were clearly and unconditionally in favor of Floyd. These two issues were the primary reasons for Floyd's request for a grievance hearing (Joint Appendix-56). For the Fourth Circuit to state that the "examiner rejected most of Floyd's requests for relief" (A31), is both factually unfounded, and significantly gratuitous. The detailed administrative remedies, alluded to by the Fourth Circuit, were not even submitted to them in the Joint Appendix, and therefore were not available for the Court's assessment, i.e. as to the

degree of success of Floyd's grievance hearing. Moreover, from both a practical and political standpoint, the NSA Hearing Examiner was not expected to demand (as Floyd requested) that Mrs. Haig, and the NSA management heirarcy (i.e. defendants Bonanni, Burke, and Jackson) appologize to Floyd for their (Haig's) defamatory remarks, but that administrative inability on the part of the NSA Examiner, does not constitute a rejection of "most of Floyd's requests for relief", as stated by the Fourth Circuit. Moreover, failure to secure apologies, does not indicate that Floyd's grievance was unfounded, - as was suggested by the Fourth Circuit in it's recitation of the factual basis of the Appeal (A31).

2. GRIEVANCE DENIED

For the Fourth Circuit to state that "the Director of NSA ultimately denied Floyd's grievance and concluded that "Mrs. Haig acted reasonably, without malice, pursuant to NSA regulations, and consistent with her managerial

responsibilities". (JA 97, also at A31) is to ratify, without examining as to truth, motive, or relevance, the former Director Inman's self-serving, untrue, non-relevant, non-sequitur response to his own Examiner's report to him, regarding the entire grievance hearing. The Director, Inman ignored his own Examiner's findings of fact. (JA 66-67). The Floyd grievance hearing was not requested, convened, nor prosecuted to show malice. High productivity and good relations with subordinates was proven by Floyd, to thereby refute Haig's libelous memorandum. The NSA grievance Hearing was not considered a court of law, and no effort was undertaken by Floyd to sue for, nor prove defamation. The factual truth and/or relevance of Director Inman's statement was improperly relied upon by the courts, particularly in light of Floyd's repeated denial of relevance, in both Pleadings (JA 23, paras. 55, 56) and Brief (JA98), as well as in his demand for a jury trial (JA 32).

3. TERMINATION OF EMPLOYMENT.

For the Fourth Circuit to recite that "NSA decided to terminate Floyd's employment at NSA.. because of Floyd's very low ratings in recent months" (App.31), and not give any apparent credence to the contradictory performance findings of the NSA Hearing Examiner (JA66), (as well as performance evaluations provided in Appendicies to Reply Brief at R.A. 14-21), whose week-long hearings were taken under oath, and finding in Floyd's favor, is to find the Fourth Circuit in a position of advocacy, as trier of facts, usurping the province of the jury, and is but a further denial of due process.

4. VOLUNTARY RETIREMENT

For the Fourth Circuit to state that "Floyd voluntarily submitted to physical and psychiatric examinations as part of the (retirement) application procedure" (A32) without giving any recognition or credence to the fact of Floyd's prior "lock-out" by NSA, and arrest by the Marine Guard, which was argued before the Fourth

Circuit, is to demonstrate a factual preference to the Appellee's theory of "voluntary" retirement, as opposed to coerced retirement, maintained by Floyd [10]. This issue is properly left to a jury.

5. RECISION OF TERMINATION

For the Fourth Circuit to acknowledge that "NSA advised Floyd that the Agency was rescinding its action to terminate him (after the retirement had already taken effect), since he was retiring on disability" (A32), and not give any expression or recognition of Floyd's contention of a calculated NSA deception (JA 108-109), by its delayed mailing (notification), i.e. recision only after the efffective date of Floyd's retirement, is to wrongly accord a factual basis to the Civil Service Commission's later denial of jurisdiction, - on the contested grounds of Floyd's "voluntary" retirement. On both counts, the Fourth Circuit wrongfully assumes a position of trier of the facts, patently skewed in favor of the Govern-

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[10] Christie v. US, 518 F2d. 584.

ment's false presentations.

6. EXHAUSTION OF REMEDIES

The Court notes that Floyd "did not appeal the Commission's decision to the Courts", (App. 33), and correctly so. Moreover, inasmuch as Floyd did not wish re-instatement at NSA, which had become a demonstrably hostile employer, nor did he wish to undertake the task of proving fraud and/or collusion between the NSA and the CSC regarding the firing/retirement, his election to seek damages rather than pursue re-instatement with NSA is viewed to be in no way prejudicial to suit for damages before the Federal District Court[11], with a Bivens remedy directly under the Constitution, as argued before the Fourth Circuit on May 6, 1985.

REGARDING LAW:

7. IMMUNITY

The Absolute Immunity granted to the defendants by the lower court, (A12-18), in spite of the

[11]Sonntag v. Dooley, 650 F2d. 904.

defendants conduct, is not justified under the facts of this case, and the facts do not warrant the Court's application of either Butz v. Economu, nor of Harlow v. Fitzgerald, (A12-17 and A36-37), as was argued fully in Appellant's brief (at pages 22-23).

> "In citing Butz v. Economou, 438 U.S. 478, and holding that "defendants have absolute immunity regarding the common law claims because their actions were within the outer perimeter of their official duties" (App.38), the court clearly misconstrued the defendant's duties as well as Butz, which said, inter alia, "While federal officials will not be liable for mere mistakes in judgement, whether the mistake is one of fact or one of law, there is no substantial basis for holding that executive officers generally with impunity may discharge their duties in a way that is known to them to violate the Constitution or in a manner that that they should know transgresses a clearly established constitutional rule". Not even the defendants claim any judicial or quasi-judicial function under which they might qualify for the absolute immunity accorded under Butz. Nor can even a liberal interpretation of the defendant's duties includor condone the constitutional violations of liberty, property or due process, attributable to the defendants. The Court further stated "the cause of action recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional

transgressions". In its final memorandum of October 5, 1983, pages 3 & 4 (JA.39/40), the District Court's inconclusive allusions to numerous case precedent, in treating the question of absolute immunity, are impervious to any meaningful analysis. The court did indicate that it would apply the "Harlow" rationale to determine whether the defendants have an absolute immunity to both constitutional claims, and the claim brought under 42 USC Sec. 1985 (1). "Harlow to be applied retroactively" - emphasis added.

The court's admission that the defendants had not met their burden to justify absolute immunity under the standards of Harlow v. Fitzgerald 102 S.Ct. 2727, are correct (App. 39). Moreover, a responsible review of the exhibits (A through D) offered by Floyd with paper #20, constitutes more evidence of wrongdoing, than the mere "allegations of bad faith" which the Supreme Court deemed "insufficient to subject officials to the burden of discovery and trial". Given the summary of Floyd's charges of NSA contract abuses (Amended Complaint at JA 9) and the documented record of false charges, redundant administrative processes, harrassment, reprisal, NSA's non-conformity to it's own regulations, NSA's disception in rescinding the "removal action", of the coerced "retirement", etc., the argument of "discretionary functions" shielding the defendants from civil liabilty, is not only irrevelvant, but evidence of gross indifference, or unfamiliarity with the record. For the court to state that "This threshold immunity question must be determined as of the time the officials' actions occured" (JA 40), or to suggest that the defendants, executives all, mightnot have percieved the non-legal quality of their concerted actions as required in Harlow, is to assume the role of advocacy,

with an argument which not even the defense has had the temerity to express to date. In charging the defendants with criminal conspiracy to defame and remove the plaintiff wrongfully, from his government position, the argument is implicit that the federal officers were not acting under color of federal law (or duties), and there would appear no reason to deny the "remedy" accorded by 42 USC Sce. 1985 (1). The court's statement (at App.40) that "Defendants here are immune from suit under 42 USC Se. 1985 (1) because, at least in 1977, there was no clear right afforded by this statute" is completely unfounded by fact and in law. Further,- the Court's disclaimer of remedy under the the U.S. and Maryland Constitutions, as well as its rationale, i.e. that the remedy "may be barred because the defendants were Floyd's superiors when he was a federal employee. For this reason, the court need not consider official immunity with respect to the constitutional claims", - are completely incomprehensible".

8. STANDING

To affirm the lower court's contention that "Floyd did not have standing to challenge the Constitutionality of 50 USC Sec. 402 note, and 50 USC Secs. 831-835, because he was not injured in fact by the operation of those laws", (App. 36), is to ignore the wrongful firing /coerced retirement; destruction of career; loss of income; defamation of character;

humiliation; psychological injury; injury to family and the entire series of factual damages,[12] - the truth of which is more properly left to the province of a jury.

9. CAUSE OF ACTION

For the District Court of Baltimore and the Fourth Circuit to analogize Floyd's case with that of Mr. Bush, (A21-23,& A37) and thereby deny him a cause of action directly under the Constitution, is: (1) to deny Floyd the right to seek damages for demonstrable injury, (and to not seek re-employment)[13], as Mr. Bush elected to do; (2) to ignore the unconstitutional provisions of PL 86-36, which preclude the application of Title 5 to NSA employees, which is the very Statute which Mr. Bush invoked to win reinstatement to his employment at Huntsville, Alabama; and (3) simply ignores the fact that the Appellee/ former Director, NSA, Admiral Inman himself

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[12]Bishop v. Tice 622 F2d. 349.
[13]See footnot #11, supra.

ignored the factual findings of his own Hearing Examiner, Mr. Charles W. Matthews (JA 62-69). For the lower courts to say (A22-23), that "Like Bush, Floyd had "an elaborate remedial system", to justify a Bush dismissal, is to again assume a position of advocacy and indulge in non-factual hyperbole. Moreover, Inman's self-regulation (or failure) is precisely the objection raised over PL 86-36 and the vesting of all three powers of government in one individual. (Pages 13-16, above).

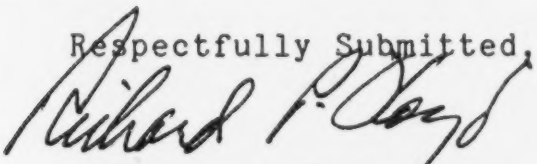
To affirm the lower court's mis-statements of facts, and mis-applications of law is in itself a continued denial of due process, and a denial of the Appellant's right to a trial on the facts, - before application of case law, which as currently applied, has no factual relevance to this case.

Mr. Floyd requests that the Court, in it's discretion, grant his Petition for a Writ of Certiorari: (a) as to both the lower court's rulings on factual issues, and in their

application of both Butz v. Economu, and Bush v. Lucas; (b) as to the Constitutionality of Public Law 86-36, as amended by Pl 88-290.

Mr. Floyd further prays that, pursuant to this Court's prior ruling in Bivens, this Court will vacate the judgements of both lower Courts, and remand the case for trial, with Judge Black recusing himself from any further association with this case.

Respectfully Submitted,



Richard P. Floyd
1800 Snowdrop Lane
Silver Spring, Maryland 20906
Tel. (301) 942-6844

APPENDIX

No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

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RICHARD P. FLOYD, Esq.

Petitioner,

v

ELIZABETH R. HAIG, et al.

Respondents,

~~~~~~~~~~~~~~~~~~~~~

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

Richard P. Floyd, Esq., Pro Se

1800 Snowdrop Lane

Silver Spring, Maryland 20906

Tel. (301) 942-6844

United States District Court
District Of Maryland
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Norman P. Ramsey
U.S. District Judge

November 17, 1981.

Richard P. Floyd, Esquire
33 Wood Lane
Rockville, Maryland 20850

Gordon W. Daiger, Esquire
Attorney, Torts Branch
Civil Division
Department of Justice
Washington, D.C. 20530

Re: Floyd v. Haig, et al.
Civil Action No. 79-1808

Dear Plaintiff and Counsel:

The Court is presently in the process of reviewing all the issues raised by defendants' motions to dismiss in the above-captioned case. As counsel for defendants and plaintiff are aware, there is a host of issues raised in plaintiff's complaint and defendants' motions. In an effort to deal with this matter in an orderly fashion, I intend to rule on the motions in a series of letter rulings and memoranda and orders. My initial rulings are contained herein. (A 1)

It is apparent that several of plaintiff's claims can be dismissed without formal memoranda parroting well established case law. A detailed anaylsis of these "obvious" issues would serve no purpose but to delay the Court's ruling on all the issues presented in this already protracted litigation. The following aspects of defendant United States' motion to dismiss, therefore, will be granted:

1. Federal Tort Claims Act -- To the extent that plaintiff seeks to recover damages against defendant United States under the Federal Tort Claims Act, 28 U.S.C. Sec. 2671, et seq., the motion to dismiss will be granted. Plaintiff has not satisfied the jurisdictional prerequisite of 28 USC Sec. 2675 (a): the timely filing of an administrative claim for money damages with the head of the agency whose employees caused the alleged wrongful act or omission. This requirement is a condition precedent to the Court's subject matter jurisdiction over the cause of action and it cannot be waived.

See Bialowas v. United States, 443 F. 2d 1047 (3rd Cir. 1971); Childers v. United States, 442 F. 2nd 1299 (5th Cir.), cert. denied, 404 U.S. 857 (1971). Although plaintiff may have exhausted the administrative review procedures as to his dismissal, it is clear from the record that he did not file an administrative claim for money damages as required by 28 U.S.C. Sec. 2675 (a).

2. Injunctive relief against the President of the United States -- The record reflects that plaintiff has not named the President as a defendant in this civil action or served him with process. Moreover, plaintiff, in his memorandum in opposition to the motion to dismiss, concedes that his claim against the President are ill-founded and asks that prayers Nos. 3 and 4 of the amended complaint be "modified". Insofar as plaintiff seeks injunctive relief against the President, the motion to dismiss will be granted.

3 Injunctive relief generally -- Plaintiff's

amended complaint fails to state any claims against the United States or any of the individual defendants for which injunctive relief is appropriate. The cornerstone of injunctive relief is the immediate threat of irreparable injury to the party bringing the action. The injuries alleged by the plaintiff all occured in the past and if actionable, are remediable in damages. Plaintiff, in his memorandum in opposition, candidly admits that the injunctive relief sought will not benefit him. The absence of a claim of irreparable injury is clear. The motion to dismiss all claims for injunctive relief will be granted.

4. Libel -- It is unclear from the amended complaint whether plaintiff is seeking damages for a cause of action sounding in libel. In his opposition to the motion to dismiss, plaintiff indicates that he is not pursuing an independent cause of action for libel. It is not necessary, therefore, to consider defendant United States' arguments for dismissal of

this cause of action. The Court understands that should plaintiff ultimately prevail in this action, there will be no reovery for libel.

Defendant United States has also argued for dismissal on the basis of plaintiff's failure to name the United States as a defendant in this civil action as required by 28 USC Sec. 1346 (b). Plaintiff instead styled his suit as one against the National Security Agency and specified individuals. It is obvious that the failure to name the United States as a defendant was merely an error in pleading, and the United States has not been prejudiced in any respect. Plaintiff, therefore, may amend his complaint to substitute the United States as a party defendant in lieu of the National Security Agency. Plaintiff should file an appropriate amendment with the clerk.

The individual defendants, Lew Allen, Jr., Roy Banner, Edward Barr, Loius Bonanni, Benson Buffham, Joseph Burke, Elizabeth Haig, B.R. Inman, Don C. Jackson, Robert L. James,

Arthur Mathisen, and John Troutner, have also raised in their motion to dismiss several obvious grounds for dismissing certain aspects of plaintiff's cause of action.

1. 42 USC Sec. 1985 (3) -- Where allegations of state action are absent, the Supreme Court has stated that a showing of racial or otherwise class-based invidiously discriminatory animus is required to recover under 42 USC 1985(3). Griffin v Breckenridge, 403 US 88 (1971). The amended complaint is devoid of any allegations of state action or class based animus. Plaintiff clearly has failed to state a cause of action under 1985(3). Count Three of the amended complaint, therefore, will be dismissed.

2. Constitutional claims -- Without ruling on whether the Court will imply a remedy directly under the Constitution in this case, it is apparent that several of the plaintiff's alleged constitutional causes of action should be summarily dismissed:

a. Privacy -- The constitutional right to

privacy has been narrowly construed by the Supreme Court as applying only where government has invaded intimate spheres of life such as marriage, procretion, family relationships, child rearing and education. See Paul v. Davis, 424 US 693 (1976); Shewmaker v. Minchew, No. 79 2097 (D.D.C. Oct. 10, 1980). No such allegations are contained in the plaintiff's pleadings or memoranda. Count Seven of plaintiff's amended complaint, therefore, will be dismissed.

b. Equal Protection -- Plaintiff has made no class based allegations to support his equal protection claim contained in Count Five. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 US 252 (1977). That aspect only of Count Five, therefore, will be dismissed.

This letter is a ruling on only those issues addressed herein. After the Court has ruled on all issues raised by defendant's motions, the rulings in this and other letters

and memoranda and orders will be incorporated into a formal order.

Very truly yours,
/s/
Norman P. Ramsey
United States District Judge

NPR/dbl

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICHARD P. FLOYD

V. CIVIL ACTION NO. B-79-1808

ELIZABETH R. HAIG,
LOUIS J. BONANNI,
JOHN R. TROUTNER,
JOSEPH P. BURKE,
EDWARD F. BARR,
ROBERT L. JAMES,
DON C. JACKSON,
ROY R. BANNER,
ARTHUR F. MATHISEN,
BENSON K. BUFFHAM,
GENERAL LEW ALLEN, JR.,
VICE ADMIRAL B.R. INMAN,
AND UNITED STATES

MEMORANDUM

Presently pending are the Motion by the Individual Defendants to Dismiss the Amended Complaint (Paper 18) and the Motion by the United States, the National Secutity Agency, and B.R. Inman, as Director, NSA, to dismiss the Amended Complaint (Paper 17). The Court has considered the extensive memoranda filed on behalf of the parties, the supporting documents, and oral argument presented at a hearing on February 18, 1983. For the following reasons, the Court will grant both of these motions, with respect to all claims, and as

to all defendants.

This suit arises from the circumstances surrounding the termination of the employment at the National Security Agency (NSA) of Richard P. Floyd, proceding pro se, but a member of the Bar. Floyd's contentions are both diverse and numerous; they will only be highlighted here. Floyd alleges that during the period November 1974, through February 8, 1977, he served as Chief of the NSA Procurement Policy and Support Division. In the latter part of this period, Floyd alleges that his relations with his superiors were difficult; in particular, that his immediate supervisor, Mrs. Haig, circulated false and defamatory memoranda. He was allegedly forced to submit to a psychological evaluation. Floyd sought and obtained a grievance hearing regarding the memoranda, but prior to the hearing he was informed of the Agency's intent to terminate his employment at the end of July, 1977. While Floyd contends that the NSA hearing

examiner found facts substantially supporting Floyd's position and recommended Floyd's reassignment to another position within the Agency, the Agency Director ultimately denied Floyd's grievance. Although Floyd was barred from Agency offices at the end of July, 1977, his firing was rescinded in September, 1977, when upon application to the Civil Service Commission, he was approved for medical disability retirement based on a psychological evaluation. The Civil Service Commission refused his appeal because his firing had been rescinded.

Judge Ramsey of this Court previously issued an informal ruling on a number of grounds raised in these motions. He dismissed Floyd's claims for damages under the Federal Tort Claims Act, 28 USC Secs. 2671 et seq., for failure to exhaust administrative remedies. Likewise, he dismissed claims for injunctive relief against the President of the United States and claims for injunctive relief in general. He confirmed the failure to state

a claim for libel, as well as for violation of 42 USC 1985 (3), the right to privacy, and the right to equal protection under the laws. Furthermore, he directed the substitution as defendant of the United States in lieu of the NSA. See Letter Order of Novemeber 17, 1981 (Paper 30).

Judge Ramsey's ruling left outstanding many claims asserted by Floyd. Floyd asserts a number of constitutional claims for violation of the first, fourth, and fifth amendments, as well as of the Maryland Declaration of Rights. Floyd alleges a violation of 42 USC 1985 (1). He seeks a declaration of the unconstituionality of P.L. 86-36, which he contends exempts the NSA from the civil service laws. Also included are a number of common law claims: tortious interference with contract and employment relations, tortious disruption of career, and intentional infliction of emotional distress.

Defendants raise numerous grounds for their motions to dismiss. For example, defendants

assert official immunity, as well as failure to exhaust administrative remedies, and a lack of proximate cause. They contend that Floyd has no cause of action for damages directly under the Constitution for violation of first, fourth, and fifth amendment rights, or for violation of the Maryland Declaration of Rights. They further contend that the amended complaint fails to state a claim for violation of 42 USC Sec. 1985 (1). Also asserted by a number of the defendants are insufficient service of process and improper venue. The director of NSA, continues to defend the constitutionality of P.L. 86-36.

Official Immunity as to the Claim Under Section 1985 (1). First, the Court will examine the defense of official immunity. The Court holds that, under Butz v. Economu, 438 US 478 (1978), defendants have absolute immunity regarding the common law claims because their actions were within the outer perimeter of their official duties. It is unclear whether defendants

have absolute immunity regarding the claim brought under 42 USC 1985 (1); the Fourth Circuit declined to determine whether the Butz standard applies to violations of this statute, see Bradley v. Computer Sciences Corp., 643 F.2d 1029 1034 (4th Cir) cert. denied 454 US 940 (1981). Furthermore it is unclear what effect the Supreme Court's decision in Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982), has on the holding of the District of Columbia Circuit that federal officials have an absolute immunity to suit brought under this subsection by a federal employee. See Lawrence v. Acree, 665 F. 2d 1319, 1326 (D.C. Cir. 1981). But see Bush v. Lucas, 103 S.Ct. 2404 (1983). Therfore, rather than apply the reasoning of the District of Columbia Court of Appeals, this Court will apply the analysis set out in Harlow to determine whether defendants have an absolute immunity to both constitutional claims and the claim brought under 42 USC 1985 (1). See Druckmiller v. United States, 553 F.Supp. 917 (E.D.Pa. 1982) (Harlow

to be applied retroactively).

In Harlow, the Supreme Court adopted the so-called "functional" approach to the official immunity of those executive officials who do not fall into the discrete categories of officials already held absolutely immune from suit. See 102 S.Ct. 2732-33, 2736. Under this approach, the defendants have the burden of justifying an absolute immunity. To satisfy this burden, each official "first must show that the responsibility of his office embraced a function so sensitive as to require a total shield from liability. He must then demonstrate that he was discharging the protected function when performing the act for which liability is asserted." Id. In discussing the discretionary authority of the Presidential aides who were the Harlow defendants, the Court stated that "[f]or aides entrusted with discretionary authority in such sensitive areas national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to

the national interest." Id. at 2735; see also nn. 18,19. A "blanket recognition" of absolute immunity for all Presidential aides in performance of all duties was unwarranted, however. Id.

Similarly, on the current state of the record, defendants here have not met their burden of justifying an absolute immunity. While they are all officials of the NSA, they have not shown how their actions regarding Floyd's employment impinge upon the national security. Thus, they have not, as yet, satisfied the second aspect of their burden of proof.

The second phase of the Harlow analysis is the determination of whether a qualified immunity applies even if defendants have not met their burden with respect to absolute immunity. The Supreme Court made clear that allegations of bad faith are insufficient to subject officials to the burden of discovery and trial. Id. at 2738. It held "that governmental officials performing discretionary functions generally are shielded from liability for civil

damages insofar as their conduct does nor violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. (citations omitted). THis threshold immunity question must be determined as cf the time the officials' actions occurred. Id. at 2739.

It is apparent from Harlow that this Court must determine whether Floyd had clearly established rights, as of 1977, under 42 USC 1985 (1). Section 1985 provides a remedy, a cause of action rather than a substantive right. Chapman v. Houston Welfare Rights Organization, 441 US 600, 619 & n.37 (1979). A cause of action under 42 USC 1985 (1) cannot be considered clearly established. Most courts have held that this subsection provides no cause of action against a federal official, see e.g. Moore v. Schlesinger, 384 F.Supp. 163, 165 (D.Col. 1974), although a few have made an exception where the plaintiff has alleged racial discrimination. See Stith v. Barnwell, 447 F. Supp.970, 973 (M.D.N.C. 1978); Alverez v. Wilson, 431 F.Supp. 136, 142 (N.D.Ill.

1977); Cf., Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1339-42 (7th Cir.) cert. denied, 434 U.S. 975 (1977)("invidious animus" unnecessary in suit by federal official against private individuals who complained about official's performance of his duties). The District of Columbia Court of Appeals in Lawrence v. Acree, at 1322, merely assumed a remedy under this subsection against federal officials. Whatever weight this assumption may have is ameliorated because this decision post-dates the actions of the defendants here. Defendants here are immune from suit under 42 USC 1985 (1) because, at least in 1977, there was no clear right afforded by this statute.

Private Damage Actions Under the Constitution Against Federal Superiors

Floyd's remedy under section 1985 (1), as well as under the first, fourth, and fifth amendments and the parallel provisions of the

Maryland Declaration of Rights,[1] may be barred because the defendants were Floyd's superiors when he was a federal employee. For this reason, the Court need not consider official immunity with respect to the constitutional claims. The question of a cause of action against federal officials cannot be divorced from that of official immunity, however. Note, Rethinking Sovereign Immunity after Bivens, 57 N.Y.U. L.Rev. 597, 598-601 (1982). Despite this doctrine, the Supreme Court has inferred causes of action for damages from the fourth, fifth, and eight amendments. See Carlson v. Green, 446 U.S. 14 (1980) (8th amendment); Davis v. Passman, 442 U.S. 228 (1979)(5th amendment); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)(4th amendment).

[1]The Maryland Declaration of Rights contains provisions parallel to those in the Bill of Rights to the U.S. Constitution. See Sanner v. Trustees of Sheppard & Enoch Pratt Hospital, 278 F.Supp. 138, 141-42 (D.Md. 1968); Rees, State Constitutional Law for Maryland Lawyers: Individual Civil Rights, 7 Balt.L. Rev.299 (1978).

This damages remedy may be foreclosed if the court finds "special factors counseling hesitation," Bivens, supra, at 396, or "an alternative remedy which [Congress] explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Carlson v. Green, supra, at 18-19. In Carlson, the Supreme Court held that the remedy provided by the Federal Tort Claims Act was not an adequate remedy. 446 U.S. at 19-23. The Eighth Circuit, on the other hand, found that the remedy provided a federal employee by the civil service discharge procedures was a sufficient substitute, although it consisted of reinstatement and back pay, rather than compensatory and punitive damages. See Bishop v. Tice, 622 F.2d 349, 356-57 (8th Cir. 1980).

The Supreme Court's recent decision in Bush v. Lucas, 103 S.Ct. 2404 (1983), is consistent with that of the Eighth Circuit. In Bush, the Supreme Court examined the availability to a federal employee of a damages action under the

Constitution against his superiors. Unlike the Eighth Circuit decision, Justice Stevens' opinion is grounded on "special factors counseling hesitation." Id. at 2412. He assumed a federal right (under the first amendment) had been violated and that in the Civil Service System, Congress has provided a less than complete remedy. Id. at 2468. Despite these assumptions, Justice Stevens was sensitive to the Government's argument that the risk of personal liability would deter federal management personnel from administering discipline. Id. at 2416. He found that Congress would be in a better position than the Court to create such personal liability. Id. at 2417. His considerations were articulated as follows:

> Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law Court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations,

should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgement should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights. Id. at 2416.

This Court is bound by the Supreme Court's decision. Floyd, however, argues that Bush is not controlling here because the NSA is exempt from the civil service laws. Floyd further contends that the Director of NSA writes his own regulations and adopts civil service regulations as he chooses. Floyd states that "no meaningful administrative overview of the NSA exists, and the protective mantle of Bush v. Lucas does not apply."

In acknowledging that the director writes his own regulations and adopts civil service regulations as he chooses, Floyd has acknowledged that there is a remedial personnel system in the NSA. The amended complaint relates details of Floyd's experience with a grievance procedure

instituted by him, including a hearing. Floyd was permitted to cross-examine witnesses appearing against him. The findings of the hearing examiner were reviewed by the NSA director. Indeed, the NSA Personnel Management Manual 30-2, ch.369, submitted by the defendants, in this proceeding, describes an elaborate system. Floyd utilized the grievance procedure with regard to the allegedly defamatory letter written by Floyd's immediate superior.

While Floyd criticizes a number of aspects of the grievance system, his principal complaint, however is that the Civil Service Commission declined to review his removal for cause on the grounds that his disability retirement rendered the issue moot. This very complaint presupposes that ordinarily a removal for cause is subject to review by the Civil Service Commission. Floyd did not directly appeal this decision of the Civil Service Commission in federal court.

The Court does not find Floyd's attempt to distinguish Bush persuasive. Like Bush, Floyd

had available "an elaborate remedial system." Because Justice Stevens assumed that provision of a less-than-complete remedy by the civil service system, inasmuch as Floyd criticizes the available remedies, this criticism is not a distinguishing factor. The Court must defer to Congress' "careful attention to conflicting policy considerations," id. at 4758, in exempting the NSA from the civil service system. Deference may be even more appropriate here than in Bush, because Congress, not the court, is best able to consider national security implications of the personnel regulations of the NSA. Congress is best able to determine the necessary extent of administrative overview of the NSA personnel regulations. Consequently, the court will dismiss all claims against the individual defendants.

Pendant State Law Claims

While the aforegoing discussion has disposed of all of the plaintiff's claims against the individual defendants, the claims asserted under Maryland common law (Counts IV,V, and VI) should

all be dismissed as pendent state law claims. In light of the Court's findings above, there is no remaining federal subject matter jurisdiction in this action, and accordingly, the plaintiff may not proceed in federal court on his state law claims. United Mine Workers v. Gibbs 383 US 715 (1958).

Constitutionality of P.L.86-36 and P.L.88-290

Floyd also seeks a decision that P.L.86-36, which he contends exempts the NSA from the procedural protections of the civil service laws, is unconstitutional. The Government argues that Floyd has no standing to challenge this law, and even if he had, there is no private right of action under it.

The Court agrees that Floyd has no standing to challenge this law based on his removal. Removal is subject to the civil service regulations. Public Law 86-36 played no part in the Civil Service Commission's refusal to review Floyd's removal. Floyd cannot satisfy the "injury in fact" requirement of standing. Even if the law

were declared unconstitutional, the decision of the Civil Service Commission would not be affected. See Duke Power Co. v. Carolina Environment Study Group, 438 U.S. 59, 73-75 & n.20 (1978).

Moreover, the Court has considered conferring third party standing on Floyd to represent the interests of current NSA employees. Justice Blackmun has set forth three relevant "factual elements:

> The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective as a proponent of the right as the latter.
>
> The other factual element to which the Court has looked is the ability of the third party party to assert his own right.

Singleton v. Wulff, 428 U.S. 106, 114-16 (1976); see also Hart & Wechsler's The Federal Courts and the Federal System 159, 184-91 (1973). The Court finds that this is not an appropriate case

in which to confer third party standing.

The Court will dismiss Floyd's prayer for declaratory judgement that P.L. 86-36 is unconstitutional.

While not seeking a declaration of the unconstitutionality of P.L. 88-290 in his amended complaint, Floyd sought such a declaration at oral argument. The Court notes that even if Floyd seeks to add such a claim, he has no standing. This section permits the director of the NSA to terminate an employee whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of employment of that officer or employee cannot be invoked consistently with national security. [1964] U.S. Code Cong. & Ad. News 197, 199. Floyd's employment was terminated not for national security reasons, but to promote the efficiency of the service.

For the aforementioned reasons, the defen-

dants' motions to dismiss will be granted and plaintiff's amended complaint will be dismissed by a separate Order entered in this case.

/s/
Walter E. Black, Jr.
United States District Judge

October 5, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICHARD P. FLOYD
V. CIVIL ACTION NO. B-79-1808
ELIZABETH R. HAIG,
LOUIS J. BONANNI,
JOHN R. TROUTNER,
JOSEPH P. BURKE,
EDWARD F. BARR,
ROBERT L. JAMES,
DON C. JACKSON,
ROY R. BANNER,
ARTHUR F. MATHISEN,
BENSON K. BUFFHAM,
GENERAL LEW ALLEN, JR.,
VICE ADMIRAL B.R. INMAN,
AND UNITED STATES

ORDER

In accordance with the aforegoing Memorandum, IT IS, this 5th day of October, 1983, ORDERED as follows:

1. That the Motion by the United States, the National Security Agency, and B.R. Inman

to Dismiss the Amended Complaint (Paper 17) and the Motion by the Individual Defendants to Dismiss the Amended Complaint (Paper 18), BE and the same hereby ARE, GRANTED as to any and all of the plaintiff's claims and prayers for relief not previously dismissed in the letter ruling of Judge Ramsey dated November 17, 1981.

2. That plaintiff's amended complaint (Paper 15) as amended (Papers 31 and 36), and each and every claim and prayer for relief thereof remaining after the letter ruling of Judge Ramsey dated November 17, 1981, BE and the same hereby IS, DISMISSED.

3. That the Clerk shall mail copies of the aforegoing Memorandum and this Order to counsel of record for all the parties to this action.

/s/
Walter E. Black Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Unpublished) No. 83-2179

RICHARD P. FLOYD

Appellant

versus

ELIZABETH R. HAIG; LOUIS J. BONANNI; JOHN R. TROUTNER; JOSEPH P. BURKE; EDWARD F. BARR; ROBERT L. JAMES; DON C. JACKSON; ROY R. BANNER; ARTHUR F. MATHISEN; NATIONAL SECURITY AGENCY; BENSON K. BUFFHAM, U.S. EMBASSY; GENERAL LEW ALLEN, JR., CHIEF OF STAFF, U.S. AIR FORCE; VICE ADMIRAL B.R. INMAN, DIRCETOR, NATIONAL SECURITY AGENCY; UNITED STATES

Appellees

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge (C/A B-79-1808)

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Argued: May 6, 1985 Decided: August 15, 1985

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Before MURNAGHAN, ERVIN & SNEEDEN, Circuit Judges

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Richard P. Floyd, Pro Se on brief for Appellant; Frederic Freillicher (Catherine G. O'Sullivan;

Richard K. Willard, Acting Assistant Attorney General; Vito T. Potenza on brief) for Appellee.

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PER CURIAM:

Richard P. Floyd appeals the dismissal of this lawsuit concerning the circumstances surrounding the termination of his employment at the National Security Agency ("NSA") in 1977. We affirm.

I.

Floyd served as the Chief of the NSA Procurement Policy and Support Division from November, 1974 until February 8, 1977. His performance evaluations during most of this period were laudatory. However, in the latter portion of his tenure, Floyd's relations with his superiors at the agency became increasingly difficult. Floyd alleges that his immediate supervisor, Elizabeth Haig, circulated false and defamatory memoranda concerning his emotional and mental health and his ability to perform his job satisfactorily. In addition, Floyd alleges that Haig forced him to submit to a psychological
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evaluations because of her "concerns" regarding his mental and emotional stability.

Consequently, Floyd sought and obtained a grievance hearing pursuant to NSA's own grievance procedures for those NSA employees who allege that they have been "unjustly treated." NSA Personnel Management Manual Sec. 369.1-4. This hearing was conducted by a NSA examiner on July 1, 1977. The examiner rejected most of Floyd's requests for relief, but did recommend that Floyd be reassigned to another position in a different part of the agency. Nevertheless, the Director of NSA ultimately denied Floyd's grievance and concluded that "Mrs. Haig acted reasonably, without malice, pursuant to NSA regulations, and consistent with her managerial responsibilities." (JA 97).

Meanwhile, prior to this July 1 hearing, NSA decided to terminate Floyd's employment at NSA as of the end of July 1977, because of Floyd's very low ratings in recent months on his periodic overall performance appraisals. As a result, Floyd was

barred from all NSA offices at the end of July.

Soon thereafter, on August 19, 1977, Floyd applied to the Civil Service Commission for medical disability retirement. As required by the Commission, Floyd voluntarily submitted to physical and psychiatric examinations as part of the application procedure. Subsequently, on September 14, 1977, Floyd was advised that his application for medical disability retirement had been approved by the Commission, to become effective September 27, 1977. On September 20, 1977, Floyd appealed the NSA's decision to terminate his employment at NSA to the Commission. Several weeks later, NSA advised Floyd that the agency was rescinding its action to terminate him since he was retiring on disability. As a result, the Commission's Federal Employees Appeals Authority refused to hear Floyd's appeal of the NSA removal action. The Appeals Authority reasoned that because Floyd was separated from NSA on the basis of his disability retirement and was not removed, the Commission did not have

appellate jurisidction over his case. The Commission's Appeal Review Board affirmed the Appeals Authority's decision. [1] Floyd then filed suit in federal district court alleging a number of diverse and varied claims relating to the termination of his employment at NSA, but did not appeal the Commission's decision to the courts.

Floyd's suit in federal court alleges that certain acts of the appellees constituted (1) a violation of his rights under the first, fourth and fifth Amendments to the United States Constitution and the Declaration of Rights in the Maryland Constitution, Articles 19, 20 and 24; (2) a violation of 42 USC 1985 (1)(conspiracy to prevent a United States officer from performing

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[1] An employee's right of appeal to the Commission does not arise until an adverse personnel action is taken against the employee. The Board concluded that no such adverse action was taken here since a separation based on disability retirement is considered "volutary in character," (JA 140-143).

his duties); (3) a violation of 42 USC (3)(conspiracy to deprive a person of the equal protection of the laws or of privileges and immunities under the laws); (4) an intentional and tortious interference with Floyd's contractual and employment relationships, and a violation of his constitutional rights respecting government employment; (5) an intentional and tortious injury to his professional career and his constitutional right not to be punished by governmental action without due process or equal protection of the law; (6) an intentional, malicious, and tortious infliction of mental anguish and distress on Floyd; and (7) an intentional and tortious infringement of his constitutional right to privacy. (JA 29-31).

Floyd seeks as relief, inter alia: (1) a declaration that 50 USC Sec. 402 note, which excepts all NSA positions from the Civil Service Laws, is unconstitutional; (2) an injunction requiring the President to provide "effective, daily administrative overview of the NSA Personnel

management activities" and to ensure that all constitutional guarantees and safeguards are accorded all NSA intelligence personnel; and (3) an order requiring the appellees to pay Floyd $500,000. in compensatory damages, and $3 million in punitive damages.

The appellees filed a motion to dismiss Floyd's complaint. In an informal letter ruling, District Judge Norman Ramsey dismissed a number of Floyd's claims. Specifically, Judge Ramsey dismissed Floyd's claims (1) for damages under the Federal Tort Claims Act, 28 USC 2671, because Floyd had failed to exhaust his administrative remedies as required; (2) for injunctive relief against the President since the President was not named as a defendant in the suit; (3) for injunctive relief against the appellees because Floyd failed to show an immediate threat of irreparable injury to himself in the absence of such relief; (4) for damages for the invasion of privacy of his constitutionally protected right to privacy because Floyd failed to show

any invasion into an intimate sphere of Floyd's life; (5) for damages for the violation of the equal protection clause because Floyd made no class-based allegations in his amended complaint; (6) for damages for libel since Floyd admitted he was not pursuing an individual cause of action for libel; and (7) for damages for violation of 42 USC 1985 (3) because Floyd failed to allege any state action of class-based animus as required by the statute.

Subsequently, the case was transferred to District Judge Walter E. Black, Jr. Judge Black dismissed the remainder of Floyd's claims, ruling specifically that (1) Floyd did not have standing to challenge the constitutionality of 50 USC 402 note, and 50 USC 831-835 because he was not injured in fact by the operation of those laws; (2) that the appellees had absolute immunity against Floyd's common law claims under the Supreme Court's decision in Butz v. Economou, 438 U.S. 478 (1978); (3) that the appellees had a qualified immunity from civil liability

in Floyd's claim under 42 USC 1985 (1) pursuant to Harlow v. Fitzgerald, 457 US 800 (1982); and (4) that the appellees were absolved of liability on Floyd's claims under the United States and Maryland Constitutions under the Supreme Court's decision in Bush v. Lucas, 462 US 367 (1983).

Floyd now appeals Judge Black's ruling and argues, in addition, that his due process rights were violated in the proceedings below.

Because we believe, after a careful review of the record, briefs and arguments of both parties, that the district court properly dismissed Floyd's various claims in the proceedings below and that none of Floyd's contentions on appeal have any merit, we affirm the judgement of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 83-2179

Richard P. Floyd
Appellant

versus

Elizabeth R. Haig, et al,
Appellees.

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Appeal from the United States District Court for the District of Maryland, at baltimore. Walter E. Black, Jr., District Judge.

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Upon consideration of the appellant's pro se motion to extend the time to file his petition for rehearing,

IT IS ORDERED that the motion is granted.

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Murnaghan, Judge Ervin and Judge Sneedan.

For the Court,

Filed October 8, 1985
U.S. Court of Appeals
Fourth Circuit

John M. Greacen
Clerk